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No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

—v.—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER EXXON CORPORATION

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This reply brief is written on behalf of Exxon Corporation (hereinafter "Exxon" or "Petitioner") in reply to the answering brief ("Answering Brief") of Central Gulf Lines, Inc. ("Central Gulf" or "Respondent") filed in opposition to the earlier brief ("Main Brief") submitted by Petitioner in support of its lien claim respecting a supply of fuel oil delivered at Jeddah, Saudi Arabia (the "Jeddah Delivery") to the M/V

Green Harbour (ex William Hooper) while the vessel was on bareboat charter from Central Gulf to the Waterman Steamship Corporation ("Waterman").

I.

Reply to Central Gulf's Point Concerning the FMLA

Central Gulf 's first point does not address whether a *Minturn* agent is entitled to admiralty jurisdiction. Instead, it apparently assumes jurisdiction and discusses only whether a *Minturn* agent is entitled to a maritime lien in light of the original Federal Maritime Lien Act of 1910, ch. 373, 36 Stat. 604 and the amendments thereto (hereinafter collectively referred to as "FMLA").

Central Gulf argues at pages 7-24 of its Brief that Congress did not specifically include *Minturn* agents within the scope of the FMLA. Central Gulf concludes its point by arguing: "where Congress has acted, either by inclusion or exclusion *of a specific group of beneficiaries*, under the FMLA, only Congress can change such statute. . . ." Answering Brief at 23 (emphasis added).

Central Gulf's reliance on the FMLA to determine whether a *Minturn* agent is entitled to a lien is based on at least two faulty premises. First, contrary to Central Gulf's assertions (Answering Brief at 8, 20, 21, 22, and 23), there is no specific list of "persons" who are intended beneficiaries in the FMLA. Instead of being "person"-specific, the FMLA describes the broad type of services and supplies covered by it. A review of the cases under 46 U.S.C. § 971 (1982 & Supp.V.) (now re-codified at 46 U.S.C.A. §31342 (a)(3)) demonstrates the wide array of services and supplies (provided both directly and indirectly) which have been held to be within the FMLA. What the FMLA does do is to establish certain

uniform rules and presumptions for enforcing liens for services and supplies which court decisions have held to be covered by it.

The net result should be that whenever a court determines that a contract for services and supplies is a maritime contract, and the services and supplies are, as here, of a type covered by the FMLA, then the FMLA rules and presumptions[1] apply. *See The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931).

Furthermore, at the time of enactment of the FMLA a lien existed under the general maritime law which should cover the case at bar. *The Kalorama*, 77 U.S. (10 Wall.) 104 (1869); *The Emily B. Souder*, 84 U.S. (17 Wall.) 666 (1875). Central Gulf's assumption to the contrary is therefore erroneous.[2] Also, cases decided since enactment of the FMLA would grant a lien in this case despite the physical supply having been made by a local supplier. *The Golden Gate, supra*; *see also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 746 (5th Cir. 1985).

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[1] *See* 46 U.S.C. § 971 (1982 & Supp.V 1987) (now re-codified at 46 U.S.C.A. § 31342(a)(3).

[2] Central Gulf attempts to distinguish *The Kalorama* on the grounds that it only applies where there is "a common intent on the part of the owner and agent to deal *exclusively* on the credit of a specific vessel." Answering Brief at 31, n. 19 (emphasis added). Neither *The Kalorama* nor the cited district court case, *The Allianca*, 63 F. 726 (S.D.N.Y. 1894), support Central Gulf's use of the word "exclusively". *See id.* at 732 and the FMLA provisions in note 1, *supra*.

II.

Reply to Central Gulf's Point Concerning Analysis of the *Minturn* Decision

Central Gulf has not accurately characterized Petitioner's analysis of the various principles underlying *Minturn*. Petitioner's analysis of *Minturn* is not based on supposition, but on the specific arguments contained in the *Minturn* briefs. Neither the briefs nor the decision itself substantiate Central Gulf's assertion that *Minturn* was based on the preliminary contract notion. *See Minturn* Appellees' Brief at 4-9.

Central Gulf also argues that the subject matter test of a maritime contract existed and was "well developed" at the time of *Minturn*, citing *dicta* from *Waring v. Clarke*, 46 U.S. (5 How.) 441, 468-69 (1847). Answering Brief at 31.*Waring* was a tort case involving a collision between two vessels. The cases contained in the passage quoted by Central Gulf do not support the existence of a "subject matter" test in contract matters as that term would be understood today. See also the authorities referred to in Petitioner's Main Brief at 26 and n.9.

The test of a maritime contract has been and remains elusive, and in need of definition. In R. Baer, *Admiralty Law of the Supreme Court*, 356-57 (1969) the author can only conclude in the short chapter dedicated to maritime contract jurisdiction: "*[i]n brief, admiralty jurisdiction will attach if a majority of the Court chooses to classify the contract as maritime.*" (emphasis in original).

III.

Reply to Central Gulf's Characterization of *Minturn* in the Lower Courts

A) *Central Gulf's Summary of Minturn in the Lower Courts*

Central Gulf argues there is harmony among the circuits over *Minturn*. This is incorrect. There is layer upon layer of discord as indicated in the Petition for a Writ of Certiorari at 5-7, Petitioner's Main Brief at 35-36, the Solicitor General's brief for a writ of certiorari at 5-7 and the Solicitor General's brief on the merits at 35-40. This discord has been caused by the fundamental irrationality of the *Minturn* rule and by *ad hoc* attempts by various courts to circumvent it.

The root cause of the discord (and *Minturn*'s irrationality) is the universally recognized point that the services of general agents are vital to maritime commerce and, therefore, that the arbitrary exclusion of claims by general agents from admiralty jurisdiction is inconsistent with the purpose of the constitutional grant of admiralty jurisdiction, i.e. the protection and promotion of maritime commerce.

Central Gulf has also mixed in with its discussion of *Minturn* some lower court cases which held, in certain instances, that the general agents there were presumed not to have relied on the credit of vessels serviced. Since the so-called presumption is said to have derived from *Minturn*, it should be rejected with *Minturn*. Indeed, at least one circuit has questioned the presumption in light of the FMLA. The Fifth Circuit recently observed that "[i]n light of the federal lien statute and the strong presumption that operates in favor of maritime liens, it is not entirely clear to us why the general agency presumption continues to survive." *First National Bank*

of Jefferson Parish v. M/V Lightning Power, 851 F.2d 1543, 1546 n. 3 (5th Cir. 1988). Furthermore, both *Lightning Power* and *The M. Vivian Pierce*, 48 F.2d 644, 645 (D. Mass. 1931), cited by Central Gulf, provide that the so-called presumption is rebuttable. In fact, *The Centaurus*, 291 F. 751, 752 (4th Cir. 1923), also cited by Central Gulf, specifically indicates that the general agent in that case (who was also a part owner) could have rebutted this presumption and acquired a lien by showing an "express agreement, oral or in writing by which Appellant, agent as aforesaid, reserved a specific lien upon the ships for the advances sued for." In that case there was no such specific reservation of a lien. In the case at bar, there was such a specific reservation of a lien (J.A. 24, ¶(B)) and hence Exxon is entitled to a lien even under such cases.

B) *Summary of Central Gulf's "Principles"*

Central Gulf concludes this point by stating:

> The Circuits have followed the reasoning that a claimant's entitlement to the extra security of a secret lien on a vessel should depend on the claimant's reliance on the credit of that vessel. If he is a stranger to the vessel, dealing with the vessel on a short-term basis and involved with the actual supply of necessaries or repairs, he may have relied on the vessel's credit. However, if the claimant had a continuing relationship with the owner of the vessel; dealt primarily with the owner when providing his services and making financial arrangements; was aware of the financial reliability of the owner; and had no direct involvement in the operation and management of the vessel, then the claimant is presumed to have relied upon the credit of the owner and is not entitled to a lien.
>
> Answering Brief at 42-43

There is no law that supports these broad propositions. In fact, these points are completely inconsistent with the presumptions contained in the FMLA.[3] Furthermore, by way of example, Petitioner was granted a lien for fuel delivered in New York in this very case, despite Petitioner's long standing arrangement with Waterman.

C) *Central Gulf's Application of Its Legal "Principles" to This Case*

Central Gulf attempts to make much of Petitioner's extension of credit in this case. Virtually every case that involves a lien question, however, involves the granting of credit by the supplier who has not insisted on being paid at the time of the service or supply. *See also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 750 (5th Cir. 1985) ("The simple existence of a business relationship and credit arrangements could hardly be realistically construed as an intent or purpose by [plaintiff] to waive its lien on the vessel.")

Central Gulf is incorrect in stating that Petitioner "maintained the practice of not arresting customer's vessels." Answering Brief at 43. In fact, Petitioner had pursued its lien rights against its customers. This included both threatening the arrest of vessels and actually arresting vessels (J.A. 140-144; 80-81).

Central Gulf argues that the district court "never made a determination on whether or not Exxon relied *solely* on the credit of Waterman." Answering Brief at 43. (emphasis

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[3] The statute provided, at 46 U.S.C. § 971 (1982 & Supp.V 1987), that: "Any person furnishing repairs, supplies . . . shall have a maritime lien . . . and it shall not be necessary to allege or prove that credit was given to the vessel." The present equivalent is contained at 46 U.S.C.A. § 31342(a)(3).

added). The issue of Exxon's entitlement to judgment, however, came up on motion and cross-motion for summary judgment. Central Gulf was obligated, *at that stage*, to raise any fact bearing on Petitioner's right to judgment. Although the issue of "sole" reliance was raised by Central Gulf (Pet. App. 27), Central Gulf offered no meaningful evidence[4] on this point. The affirmative evidence offered by Exxon showed that the Exxon/Waterman contract specifically provided that deliveries were "made not only on the credit of the Buyer but also on the faith and credit of the vessel which used the Marine Fuel. . . ." (J.A. 24). In addition, Exxon showed that it had relied on the security of liens by having enforced them in the past (J.A. 140-41; 80-81). Exxon also offered evidence that neither it (J.A. 138, item 4) nor the local supplier (J.A. 53-55) had knowledge of a prohibition of lien clause later said to be in the Central Gulf/Waterman charter.

Furthermore, as the commentators, court decisions and the FMLA make clear, the heavy burden of proof on "sole" reliance is on Central Gulf. See authorities contained in Petitioner's Main Brief at page 47. Having not submitted any meaningful evidence on the issue of sole reliance when required to do so, Central Gulf should not now, years later, be allowed to relitigate this issue in the District Court. To avoid a waste of judicial resources, especially on an issue so clear as that here which arose on motion for summary judgment, the Court should direct judgment in favor of Exxon. *The First*

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[4] Central Gulf argued then, as now, 1) that Exxon increased Waterman's credit line, 2) Exxon sought other security from Waterman, and 3) Exxon allegedly never arrested vessels for unpaid fuel. "Memorandum of Law of Central Gulf Lines, Inc. In Opposition of Plaintiff's Motion for Summary Judgment" filed June 23, 1988 at pages 21-22. The first two points are insufficient as a matter of law to avoid judgment and the third is incorrect.

National Bank of Pennsylvania v. The Lincoln National Life Insurance Co., 824 F.2d 277, 282 (3d Cir. 1987).

IV.

Reply to Central Gulf Point That Rejection of *Minturn* is Unnecessary

Central Gulf argues for application of what it characterizes as the preliminary contract aspect of *Minturn*. Under Central Gulf's view, Exxon's involvement was only preliminary and "tangential." Under the universal view of the commentators, however, the role of a general agent is critical to maritime commerce. This is particularly true in this case since, if Exxon had not arranged for the fuel under its contracts, the vessel would have been stranded in Jeddah. Central Gulf's notion that Waterman could have fueled the vessel at Jeddah by other means is belied by the facts, which show that Waterman's own local supplier refused Waterman's request to fuel the vessel (J.A. 35, 49-51).

Central Gulf's attempt to invoke the preliminary contract distinction in this case shows the arbitrariness of that distinction.[5] Instead of relying on such an arbitrary test, the jurisdictional inquiry should be into the relation between the services or supplies provided and maritime commerce. In this case, Exxon both procured, advanced its credit and paid for the fuel. Further, Exxon continued to have potential involvement at the dock in Jeddah by reason, for instance, of Exxon's right to take action in the event of a fuel spill (J.A. 27-28) and even thereafter by reason of Buyer being required to submit claims

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[5] *See* 1 S. Friedell, *Benedict on Admiralty* § 183, 12-8 & n. 8 (7th ed. 1989) discussing the difficulty of reconciling the preliminary contract idea with the recent case of *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

for quality, quantity and price of the fuel to Exxon within 45 days (J.A. 24). In short, the services and supplies effected by Exxon were vital to the vessel and its role in maritime commerce. Granting Petitioner jurisdiction in this case will not, as suggested by Central Gulf, open the federal courts to suits by agents of all varieties, irrespective of the importance of the services they might provide to maritime commerce.

Finally, Central Gulf suggests that granting liens to general agents will impede maritime commerce by allowing more vessels to be arrested on account of "secret liens".[6] However, recognizing liens in this and other service and supply cases will both protect an important segment of the shipping industry and facilitate the advancement of credit to vessels, thereby protecting and promoting the interests of maritime commerce.

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[6] In the last two paragraphs of its Answering Brief, Central Gulf refers to the phrase "secret liens" on four separate occasions. There is nothing "secret" about the fact that a lien might arise from the sales of bunkers to a vessel. Furthermore, *bona fide* purchasers of vessels routinely guard against liens by obtaining warranties that purchased vessels are free and clear of liens. *See also* G. Gilmore & C. Black, *The Law of Admiralty* § 9-77 (2d ed. 1975) indicating the short time available to assert a lien against a vessel purchased by a *bona fide* purchaser.

Conclusion

For the reasons stated herein and in Petitioner's Main Brief, Petitioner respectfully requests that the judgment below, which held Exxon's suit and lien claim respecting the Jeddah Delivery were outside admiralty jurisdiction, be reversed, and that the district court be directed to enter judgment in favor of Exxon, after giving Central Gulf credit for amounts paid, and for any further and different relief as may be just and equitable.

Respectively submitted

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